The plaintiff sued as the administratrix of the estate of her deceased husband and claimed damages to the estate and for the benefit of the deceased's dependants by reason of the defendants' negligence in causing a motor accident which resulted in the deceased being injured on the 6th September 1951. He died on 7th October 1951.

The issues were :—

(1) Whether the defendants, or either of them, had been guilty of negligence;

(2) If so, whether the death of the deceased was caused by the negligence or by some "**novus actus interveniens**".

(3) If the death was caused by the defendants' negligence what damages should be awarded under section 8 of the Civil Law Ordinance;

(4) If the injury but not the death was caused by the defendants' negligence, what damages should be awarded under section 7 of the Civil Law Ordinance in respect of the cause of action which vested in the deceased prior to his death for the pain which he suffered and for what is called "loss of expectation of life";

(5) Special damages.

The 1st defendants paid the sum of $7,000 into Court in the afternoon of the day before the hearing started. The hearing lasted four days, and at the end of the 4th day counsel for the 1st, and 2nd defendants had completed their final speeches and counsel for the plaintiff was addressing the Court having dealt substantially with the 2nd issue.

On behalf of the plaintiff it is said that in paying the money into Court on the day before the hearing the 1st defendants deprived the plaintiff of the 7 days which O.23 Rule 2(1) provides. Against that the plaintiff has had the considerable advantage of hearing all the evidence before having to make up her mind whether to accept the sum paid in or not. And as I have had all the evidence before me I think that the proper course is to award costs upon the basis of what my Judgment would have been if it had been delivered.

If the case had gone to Judgment I should have held (1) that the first defendants' driver was solely to blame for the accident; (2) that the death of the deceased was not due to the injury which he received at the time of the accident, but to his own disregard of the doctor's instruction which operated as a '*novus actus interveniens.*' The plaintiff would then have been entitled to recover from the 1st defendants the whole of the costs of the action up to the date of payment in, and the subsequent costs of the issues on which she succeeded. The plaintiff would have been liable for the 2nd defendant's costs, which she could have recovered on a Bullock order from the 1st defendants. I accordingly order :—

(1) Plaintiff must pay the 2nd defendant's costs;

(2) The 1st defendant must pay the plaintiffs costs up to the date of payment in including the costs payable by plaintiff to 2nd defendant; and thereafter upon the issues of —

(a) 1st defendant's negligence, (the first issue).

(b) Damages under section 7 of the Civil Law Ordinance (4th issue).

(c) Costs of hearing all medical evidence. I make this part of the order because I consider that as the plaintiff was deprived of the advantage of having 7 days to consider whether to accept the money or not she should not be penalised for failing to make up her mind before the expert medical evidence was called during the first and second days of the hearing.

(3) The plaintiff must pay the first defendant's costs incurred after the date of payment in upon the issues of —

(a) The "**novus actus interveniens**" (2nd issue); (except costs of hearing medical evidence).

(b) Damages under section 8 of the Civil Law Ordinance (3rd issue);

(c) Special damage. (5th issue).

These costs will be on Higher Scale and in taxing these costs the Registrar is to apportion the costs under items (2) and (3) above between the five issues set out therein.

I further order that the sum of $7,000, now in Court, be paid out to the plaintiff.

Order accordingly.

TAN SAI HOON (f) v. TAN SONG CHUA & ANOR.

[O. C. J. (Buhagiar, J.) November 13, 1952]

[J.B. — Civil Suit No. 4 of 1949]

Civil Procedure Code, ss. 298 and 299 — Order of attachment — Objection by 3rd party — Whether procedure to vacate can be by fresh suit.

The plaintiff claims to be owner of property which was ordered to be attached in an action in which judgment was given for the 1st defendant against the 2nd. The plaintiff proceeded by a separate suit praying for a declaration that she is the owner and for an order to set aside the order of attachment. Counsel for the 1st defendant raised a preliminary objection on the ground that the plaintiff should have proceeded by application for release of the property attached as provided by section 298 of the Civil Procedure Code.

Held: the procedure laid down in sections 298 and 299 of the Civil Procedure Code is not exclusive but cumulative.

Cases referred to :—

(1) *Wai Seng Leng v. Chait Singh* (1939) M.L.J. 316.

(2) *Sundar Singh & ors. v. Ghasi & ors.* 18 All. 410.

CIVIL SUIT.

A. Muthuswamy for the plaintiff.

C. G. Toh for the 1st defendant.

2nd defendant not represented.

Cur. Adv. Vult.

Buhagiar, J. : — In Johore Bahru Civil Suit No. 5 of 1948, the first defendant in this suit obtained judgment against the second defendant in the sum of $1,362 and costs and, in execution of a decree of the Supreme Court made in that suit, a movable dwelling house built on the land comprised in Lot No. 2761, Mukim of Rimba Terjun in the district of Pontian, was on the 20th December, 1948, attached by and at the instance of the first defendant.

The plaintiff claims that she is the owner of the said dwelling house and in this suit she is praying for a declaration that the said dwelling house is her property and for an order setting aside the order of attachment dated the 9th December, 1948, in Civil Suit No. 5 of 1948.

Mr. Toh, counsel for the first defendant, raised the preliminary point that the suit is misconceived in that the plaintiff should have proceeded by an application for the release of the property attached as provided by section 298 of the Civil Procedure Code and not by virtue of a fresh suit. Mr. Toh submitted that the remedy provided by that section is exclusive and that there is no other remedy open to any person alleging himself to be the owner of the property which has been attached. Mr. Toh referred to the case of *Wai Seng Leng v. Chait Singh*[1]. In that case A obtained a decree against B and, in an attempt to obtain the fruits of his judgment, had obtained the appointment of a Receiver, by way of equitable execution under the provisions of section 275A of the Civil Procedure Code, to receive the rent of a house, the property of B. C, a third party, alleged that B had transferred the house to him and for some time rent was paid by the tenants of the house to C. At some time the Receiver sent notice to the then tenant in consequence of which the tenant notified C and sent him a copy of the Order of the Court appointing the Receiver. C applied to the Court praying that the Order of the Court appointing the Receiver be vacated. He did this by Notice of Motion in the proceedings in which the Receiver was appointed. The argument before the Court was directed to the point as to whether C had adopted the proper procedure in attempting to obtain relief. Counsel for C contended that the appointment of a Receiver was not execution on the property and that such property had not been attached and that therefore the procedure detailed in sections 298 and 299 of the Civil Procedure Code was inapplicable where a third party claimed relief. The Court of Appeal held that the methods provided by sections 298 and 299 were applicable to section 275A.

Wai Seng Leng v. Chait Singh[1] is, I think, an authority for the proposition that, where it is desired to obtain relief in the proceedings in which an Order of Court was made, the proper procedure is that laid down in sections 298 and 299 of the Civil Procedure Code and not Notice of Motion. There is nothing, however, in the judgment of the Court of Appeal which lays down that sections 298 and 299 provide the only method of obtaining relief. Nor can I see anything in the provisions of these sections from which it can be inferred that it was the intention of the legislature that the method therein laid down is the only and exclusive method. The provisions of the Indian Civil Procedure Code on the matter are in some respects different from the provisions of the local Civil Procedure Code. Under the Indian Civil Procedure Code, "where an objection to attachment is made by a party to the suit or his representative the objector should proceed by an application under section 47; a separate suit for the purpose is barred. But where an objection to attachment is made by a third party the objector may either proceed by an application under Rule 58 Order 21 or he may bring a regular suit to establish his objection; failure to proceed by an application under Rule 58 Order 21 is no bar to a separate suit." (Vide the *Code of Civil Procedure* by *D. F. Mulla*, 10th ed. 1934 at p. 776). It would seem that in view of the provisions of section 272 (i) (c) of the local Civil Procedure Code (which correspond to section 47 of the Indian Civil Procedure Code), the distinction between an objection by a party to the suit and an objection by a third party applies in the case of the local Civil Procedure Code; but as in this case the plaintiff is a third party it is not necessary for me to decide this point. I think, however, that the principle laid down in *Sundar Singh & ors. v. Ghasi & ors.*[2] applies to sections 298 and 299. There the Appellate Civil Court stated at p. 411 :—

> "It is quite true that that section (section 278 of the Civil Procedure Code, 1882, now Rule 58 Order 21) provides a means by which, without the trouble and expense and delay of instituting fresh suits, a person whose interests are assailed in the execution department may seek his remedy, and only then, upon failure of his claim or objection, may be compelled to have recourse to the provisions of section 283 (now Rule 21 Order 63) to declare his rights..... It seems to us upon general principles that no person can be excluded from his right of suit by the provision of a means of a special kind in certain circumstances, and we look in vain for any indication that the provisions of section 278 and the succeeding sections are intended to be exclusive..... Had the legislature intended that the provisions of section 278 of the Code of Civil Procedure and the succeeding sections should be of an exclusive kind, one short sentence would have made the necessary correction."

The same reasoning applies in the interpretation of sections 298 and 299 of the local Civil Procedure Code for the purposes of the present case; in my

opinion the remedy laid down in those sections is not an exclusive but a cumulative remedy; the remedy is alternative to the remedy by way of suit.

For these reasons, the objection of the first defendant is overruled. Costs to be paid by the first defendant.

Order accordingly.

R. v. CHIN AH CHONG.

[A. Cr. J. (Spenser Wilkinson, J.) November 13, 1952]

[Penang — Criminal Appeal No. 33 of 1952]

Criminal Procedure Code (Cap. 21) — Whether s. 252 gives power to the Court to award costs — If so whether the section binds the Crown — Circumstances under which costs should be awarded.

This is an appeal against the order of the President of the Sessions Court awarding costs against the Crown as a term of an adjournment. The prosecuting officer became sick on the day of the trial and later in the morning a Police Officer applied for an adjournment on the ground of the prosecuting officer's illness. The learned President considered the circumstances sufficiently exceptional to award costs against the Crown. The appeal raises three important questions: (1) Whether the words "on such terms as it thinks fit" in section 252 of the Criminal Procedure Code give power to the Court to award costs as part of those terms; (2) if so, whether this section binds the Crown; (3) if the section covers costs and binds the Crown, whether the learned President was correct in the circumstances to award costs?

Held: (1) on the 3rd question, before costs are awarded against the Crown under section 252 the circumstances must be exceptional. There should be some element of frivolity, vexation or unreasonableness. In this case the sudden illness of the prosecuting officer is a reasonable ground for an adjournment; (2) there are various sections in the Code dealing with costs so that if it is intended that section 252 should confer the power to award costs it should have specially said so; (3) section 55 of the Interpretation and General Clauses Ordinance, 1948, clearly lays down that the Crown is not bound unless it is expressly provided or there is a necessary implication that the Crown is bound. The Criminal Procedure Code being an Ordinance the main purpose of which is to regulate proceedings between the Crown and the subject, there is a necessary implication that the Crown is bound.

Cases referred to:—

(1) *In re Abdul Rahiman* 52 Bom. 254.

(2) *S. Ratnam Thangavelu v. Public Prosecutor* (1934) M.L.J. 225; (1933-34) F.M.S.L.R. 283.

(3) *R. v. Mohamed bin Sudin* (1935) M.L.J. 274; (1935) S.S.L.R. 309.

(4) *Thomas v. Pritchard* (1903) 1 K.B. 209.

(5) *Moore v. Smith* 120 E.R. 1034.

CRIMINAL APPEAL.

C. M. Sheridan (D.P.P.) for the Crown.

C. O. Lim for the respondent.

Spenser Wilkinson, J. : — This was an appeal on behalf of the Crown against an order of the President, Sessions Court awarding $30 costs against the Crown as part of the terms of an adjournment in a prosecution in which the accused was charged with certain offences under section 193 of the Penal Code.

The question of costs arose in this way. There had been certain adjournments and the case was fixed to proceed at 10 a.m. on the 13th June, 1952. At 8.30 a.m. the wife of the prosecuting officer informed the President by telephone that the prosecuting officer was sick and would be unable to appear in Court that day. No one appeared to represent the prosecution until 10.45 a.m. when a Police officer appeared to ask for an adjournment on the ground of the prosecuting officer's sickness. The learned President considered that the circumstances of the case were sufficiently exceptional to allow costs against the prosecution, because the prosecution had not done all that might reasonably be done to ensure that the case should go on that day, in that the prosecution had not taken steps to call the investigating officer to assist a substitute prosecuting officer.

Three questions arose on the argument of the appeal:—

(1) Does the expression in section 252 of the Criminal Procedure Code "on such terms as it thinks fit" give power to the Court to award costs as part of those terms?

(2) If so, does this section bind the Crown?

(3) If the section covers costs and binds the Crown, was the learned President correct in the circumstances of this case in making the order as to costs?

I will deal with the third point first. I think there is no doubt that before costs are awarded against the Crown under section 252 the circumstances must be exceptional. In the Indian case of *In re Abdul Rahiman*[1] the following passage appears in the judgment of Heaton, J.: —

"It will be seen from the case of **Mathura Prasad v. Basant Lal** that the Allahabad High Court has come to the conclusion that such an order is permitted by the terms of section 344 of the Code of the Criminal Procedure. The same conclusion, we gather, has been reached by the High Courts of Calcutta and Madras. But the Criminal Procedure Code does not make special provision for costs in the course of a criminal trial and one thing seems to me to be perfectly clear and it is this: That if section 344 is to be regarded as justifying an order as to costs it can only be where the circumstances are exceptional and where for some reason or another the ordinary everyday method of conducting criminal cases must be departed from."

The local cases of *S. Ratnam Thangavelu v. Public Prosecutor*[2] and *Rex v. Mohamed bin Sudin*[3], both of which were decisions on what is now section 316 of the Straits Settlements Criminal Procedure Code, decided that before a respondent can be awarded costs in a criminal appeal he must show that the